

**IN THE SUPREME COURT OF FLORIDA**

INQUIRY CONCERNING  
A JUDGE NO. 02-487

Supreme Court Case  
No.: SC03-1171

**RESPONDENT’S MOTION IN LIMINE TO EXCLUDE  
COPIES OF THE PURPORTED HOLDER PAPER  
ON AUTHENTICATION GROUNDS  
AND SUPPORTING MEMORANDUM OF LAW**

The Honorable Gregory P. Holder (“Judge Holder” or “Respondent”), by counsel, files with the Hearing Panel of the Florida Judicial Qualifications Commission (“the Panel”) this Motion in Limine to Exclude Copies of the Purported Holder Paper on Authentication Grounds and Supporting Memorandum of Law (“Motion”).

On July 16, 2003, the Florida Judicial Qualifications Commission (the “JQC”) filed a Notice of Formal Charges (the “Charges”) asserting that probable cause existed to institute formal proceedings against Judge Holder to determine whether he had plagiarized a paper submitted to the Air War College in 1998 and made a false statement when he certified that the paper was his original work. The papers upon which the JQC relies to support its allegations are a copy of an Air War College (“AWC”) paper submitted by E. David Hoard in 1996 (the “Hoard paper”) (Ex. 1), and two alleged copies of a paper that plagiarized the Hoard paper and purports to have been submitted to the AWC by Judge Holder in 1998 (“purported Holder paper”) (Ex. 2 & 3) (*Also attached as Exhibit “A” to the Notice*

of Formal Charges.) This Motion seeks to exclude from evidence the alleged copies of the purported Holder paper.

## **I. BACKGROUND**

The factual background concerning the purported Holder paper has been set forth in detail in Respondent's Motion in Limine to Exclude Evidence on Due Process Grounds and Supporting Memorandum of Law.

## **II. THE PURPORTED HOLDER PAPER CANNOT BE AUTHENTICATED AND THUS MUST BE EXCLUDED.**

This proceeding is governed by the Florida Rules of Evidence which provides that the Florida Evidence Code applies to all civil proceedings and "all other proceedings." § 90.103, Fla. Stat. (2003).<sup>1</sup>

Under the Evidence Code, "Authentication or identification of evidence is required as a condition precedent to its admissibility." Fla. Evid. Code § 90.901. Before evidence is admissible, the proponent must adduce "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* See

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<sup>1</sup> See also Fla. Jud. Qual. Comm'n R. 14 (permitting admission of only "legal evidence"); Hrg. Transcript at 4 (Dec. 18, 2003) (Judge Kuder) ("Unless there's a compelling reason to do otherwise as it relates to a particular item of evidence, then I'm going to follow as closely as I can to the Evidence Code."). The Special Counsel to the JQC has consistently maintained that the Florida Evidence Code applies to JQC proceedings. See, e.g., JQC's Mot. in Limine to Exclude Stipulation at 4 (Jan. 17, 2000), *In re McMillan*, 797 So. 2d 560 (Fla. 2001); Special Counsel's Mot. to Strike Resp.'s Mot. for Part. Summ. J. at 2, *In re Cope*, 848 So. 2d 301 (Fla. 2003); JQC's Mot. in Limine at 5, *In re Baker*, 813 So. 2d 36 (Fla. 2002).

also *ITT Real Estate Equities, Inc. v. Chandler Ins. Agency*, 617 So. 2d 750, 750-751 (Fla. 4th DCA 1993); C. Ehrhardt, *Florida Evidence* § 901.2 (2002 ed.).

The authentication requirement exists, among other things, to prevent fraud. *See* 5 C. Mueller & L. Kirkpatrick, *Fed. Evid.* § 513 (2d ed.) (“Fed. Evid.”). A court resolving a dispute should not assume that a matter offered in evidence is what it appears to be on its face, or what the offering party claims it to be, but rather must require formal proof of the identity or nature of the matter in question. *Id.* “The rationale is that in the absence of a showing that the evidence is what its proponent alleges, the evidence is simply irrelevant” and should not be considered by the fact finder. *See United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989).

Thus, the JQC must adduce evidence that the purported Holder paper is what the JQC claims—the actual paper submitted by Judge Holder to the AWC in 1998. The JQC cannot carry that burden.

**A. There Is No Direct Evidence Authenticating the Purported Holder Paper**

The JQC admits that it does not have a single witness who can testify that the purported Holder paper is an authentic copy of the paper that Judge Holder submitted to the AWC in 1998. In fact, all of the eyewitnesses have and will testify to the contrary: Respondent denied that the purported Holder paper was written by him, and four witnesses who reviewed Judge Holder's AWC paper in 1998 state that the purported Holder paper is not Judge Holder's paper. *See Resp.'s Mot. in Limine to Exclude Evid. on Due Process Grounds* at 3-4, 7-8 ("Due Process Mot."). All of the eyewitness testimony in this case indicates that the purported Holder paper is not authentic. Accordingly, the purported Holder paper must be excluded.<sup>2</sup>

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<sup>2</sup> *See Mills v. Barber*, 664 So. 2d 1054 (Fla. 2d DCA 1995) (modification agreement could not be authenticated where witness could only identify two of three signatures on document); *Bishop v. State*, 555 S.E.2d 504 (Ga. Ct. App. 2001) (excluding evidence where opponent denied having written or signed document); *Hinojosa v. State*, 788 S.W.2d 594 (Tex. App. 1990) (excluding evidence where recipient could not identify document).

**B. The Circumstantial Evidence Fails to Authenticate the Purported Holder Paper**

Without any direct evidence, the JQC's attempt to introduce the purported Holder paper into evidence must rest on circumstantial evidence. Indeed, the AWC grader himself could not authenticate the document as having been submitted by Respondent. *See* Due Process Mot. at 8 n.5. Any attempt to rely upon the circumstances surrounding its acquisition, possession, or transmission—or the distinctive characteristics of the purported Holder paper itself—still fails to show that the document is authentic. *See* C. Ehrhardt, *Fla. Evid.* § 901.5 (2002 ed.).

**1. The Purported Holder Paper Was Not Found In Respondent's or the AWC's Custody**

The most compelling “circumstantial proof” is often evidence that the writing was found in the custody or possession of a person or entity. “With writings, custody or possession may indicate either authorship or some other kind of connection to the person which assures its relevancy.” *Fed. Evid.* § 519; *see also U.S. v. Eisenberg*, 807 F.2d 1446 (8th Cir. 1986) (letter found in defendant's suitcase). Accordingly, the lack of connection between the evidence and the accused weighs heavily in favor of exclusion.

For example, in *Landers v. State*, the court held that the trial court erred by admitting into evidence without authentication a check purportedly forged by the

defendant. *See* 519 S.W.2d 115, 117 (Tex. Crim. App. 1974). The court noted that “there is no indication in the record where the check came from or who had it.” *Id.* Importantly, the *Landers* court recognized that admission of evidence under these tenuous circumstances could easily result in an injustice:

Apart from the question of relevancy, if evidence is to be admitted in a trial without any authentication or identifying testimony whatsoever, it would open the door to the easy fabrication or manufacture of evidence and possibly lead to serious injustices. It would have been simple for anyone to write appellant’s name and place his driver’s license and social security number on the back of the check, and thus incriminate him and bolster the charge against him falsely, even though the check might never have been in his possession or had never been cashed or presented for payment anywhere.

*Landers*, 519 S.W. 2d at 118.

Likewise, in *Williams v. State* the court held that the trial court abused its discretion when it admitted a letter confessing to a crime, because there was an insufficient link between the defendant and the letter:

This letter was allegedly delivered to [the victim] by [defendant’s] brother, who did not testify. While it allegedly came in the mail, no envelope was introduced into evidence. Unlike the documents in [two other cases], this letter was found nowhere near Appellant or his possessions. Unlike the defendant in [another case], no evidence in this case other than the letter showed that Appellant had confessed to the crime. Based on the law and evidence in the record before us, we hold that the trial court abused its discretion in admitting the letter.

2004 WL 362285, at \*2 (Tex. App. 2004). *See also State v. Fugate*, 691 So. 2d 53, 54 (Fla. 4th DCA 1997) (excluding handgun where “there was no evidence to link

that particular gun to either the defendant or the crime”); *State v. Ranger*, 697 A.2d 505, 507 (N.H. 1997) (holding that in the absence of any connection to the defendant, the evidence lacks relevancy and must be excluded).

Similarly, in this case, no evidence links Respondent to the purported Holder paper. That paper was not found in his possession or in the possession of the AWC. Rather, it was mysteriously and anonymously delivered to a limited access military reserve headquarters along with an envelope and note that have been inexplicably discarded. In short, nothing ties the purported Holder paper to Respondent.

## **2. The Content and Appearance of the Purported Holder Paper Do Not Provide Sufficient Circumstantial Evidence.**

Neither the content nor the appearance of the purported Holder paper is sufficient to authenticate the paper as the paper Respondent submitted to the AWC. When authorship is at issue—as it is in this case—courts have consistently held that “the mere conten[t] of a written communication purporting to be a particular person’s” is not, in and of itself, “sufficient circumstantial evidence of genuineness.” *U.S. v. Sutton*, 426 F.2d 1202, 1207 (D.C. Cir. 1969). This limitation on the role of content serves “as a protective device minimizing the occasion for fraud on the innocent and imposition on the courts.” *Id.*



In any event, the contents of a document are persuasive of authorship where the written communication reveals knowledge or other traits peculiarly attributable to the purported author. *See State v. Love*, 691 So. 2d 620, 622 (Fla. 5th DCA 1997) (admitting letter containing “details concerning the crime, the relationship between the co-defendants, the incriminating evidence, and a proposed plan to fabricate testimony” because such “information was likely known only by the three co-defendants”); *Martin v. State*, 217 S.E.2d 312, 317 (Ga. Ct. App. 1975).

The contents of the purported Holder paper fail to reveal any knowledge or other traits peculiarly attributable to Judge Holder. The purported Holder paper was a factual paper on an assigned topic written with readily accessible sources. Indeed, AWC students wrote hundreds of papers on this exact topic and AWC alumni—including Respondent—frequently circulated their papers to other people. Thus, the fact that Respondent also wrote on this topic offers no evidentiary value. Likewise, the executed Certificate appearing to bear Respondent’s signature could have been easily fabricated or removed from Respondent’s actual paper and attached to the purported Holder paper. *See United States v. Payne*, 492 F.2d 449, 454-55 (4th Cir. 1974) (noting that “Hubert Payne” appearing on a money order has “little evidentiary weight to implicate Hubert”).<sup>3</sup> Therefore, the contents of the

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<sup>3</sup> Moreover, the AWC grader, Lt. Col. Howe, could only identify his handwriting, but could not identify the contents of the paper itself as Judge Holder’s paper. *See Due Process Mot.*

purported Holder paper do not establish that it is the paper Respondent submitted to the AWC in 1998.

Additionally, the appearance of the purported Holder paper does not establish its authenticity. “The specificity, regularity and official appearance” of a document increase its likelihood of being authentic. *United States v. Reilley*, 33 F.3d 1396, 1406 (3d Cir. 1994). Other than the format of the paper—which could have been easily copied from any other AWC paper in circulation, including Respondent’s missing paper, or from the style manual supplied by the AWC—the purported Holder paper completely fails to contain any of the official authenticating markings utilized by the AWC. The purported Holder paper lacks a date-received stamp, a handwritten grade, handwritten concluding remarks, and a formal grading sheet containing typed remarks and the grade. *See* Due Process Mot. at 9-10. Without these markings, authenticity cannot be established. *See Cobb v. State*, 89 So. 417 (Fla. 1921) (holding admission of marriage certificate error because of a total lack of proof as to its authenticity—certificate did not contain an official seal and there was nothing to show the paper emanated from any court of record); *Louis v. State*, 647 So. 2d 324, 325 (Fla. 2d DCA 1997) (trial court erred in admitting fingerprint cards where the cards did not bear a seal of the State of Florida or signature of a court officer). Simply stated, the purported

Holder paper is not self-authenticating based upon any contents distinctive to its alleged source, as are some kinds of official documents.

Even if the purported Holder paper had such markings, distinctive characteristics cannot be viewed in isolation, but must be evaluated in conjunction with the circumstances. *See ITT Real Estate Equities, Inc. v. Chandler Ins. Agency*, 617 So. 2d 750, 751 (Fla. 4th DCA 1993).<sup>4</sup> The circumstances surrounding the purported Holder paper make it impossible to authenticate. The paper was not found in his possession or in the possession of the AWC. Rather, it was mysteriously and anonymously delivered to a limited access military reserve headquarters four years after the paper allegedly had been submitted to the AWC. Moreover, the deliverer of the paper is anonymous and the envelope and note supposedly accompanying the paper were discarded, making the paper impossible to trace. All of the events are suspicious, especially given that Respondent was a cooperating witness in a number of major investigations into public corruption and misconduct. *See Due Process Motion* at 4-5. Moreover, as exemplified by manufactured papers used in connection with the AWC grader's deposition, an

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<sup>4</sup> *See also Fed. Evid.* § 517 (“If, for example, the proponent offers a purported letter from the adverse party containing a statement damaging to him, the fact that the writing indeed appears to be such a letter (being laid out in the appropriate manner and carrying an apparent closing signature in the expected name) does not by itself authenticate it ... so as to establish that the statement is the adversary’s admission.”).

AWC paper can be easily fabricated. *See id.* at 9 n.5. Under these circumstances—combined with the fact that five witnesses will testify that the purported Holder paper is not the paper Respondent submitted to the AWC—the purported Holder paper must be excluded from evidence.

If the Panel desires oral argument on this motion, Judge Holder respectfully requests that it be set as soon as can be scheduled by the Panel.

Dated: August 25, 2004

Respectfully Submitted,

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### CERTIFICATE OF SERVICE

I certify that on August 25, 2004, a copy of the foregoing has been served by telcopier to Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629.

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